Office-Supreme Court, U.S.
FILED
JUL 27 1964
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 328

SAMUEL G. BENO
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to The United States Court of Appeals for the Second Circuit

W. PAUL FLYNN, Esq.,
157 Church Street,
New Haven, Connecticut.

FRANK J. RACCIO, Esq.,
BERNARD P. KOPKIND, Esq.,
CHARLES L. FLYNN, Esq.,
Of Counsel.
157 Church Street,
New Haven, Connecticut.

THE MACK CO., NORTH HAVEN, CONN

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on May 28, 1964.

The opinion of the Court of Appeals (Kaufman and Hays, Circuit Judges, and Bartels, District Judge sitting by designation) is thus far unreported and is reprinted in Petitioner's Appendix A. An earlier conviction was reversed and remanded

and the decision in that case is reported in 324 F.2d 582 (2d Cir. 1963).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

STATEMENT OF THE CASE

The judgment of the Court of Appeals, from which Petitioner seeks review, affirmed a judgment of conviction of the Petitioner, for a violation of Title 18 United States Code, Section 202. The pertinent parts of Section 202 are set forth in Petitioner's Appendix B.

Upon the trial, the Petitioner was convicted as charged and was sentenced on January 20, 1964. (R. 149a)* Appeal was taken to the Court of Appeals for the Second Circuit; and that Court, on May 28, 1964, affirmed the conviction of the Petitioner. The Petitioner was charged in a one count indictment with a violation of Title 18 United States Code, Section 202. (R. 8a)

Thereafter, the Petitioner submitted an application to stay the mandate and to continue the defendant in bail pending a Petition for Certiorari and the panel granted said application on June 17, 1964. On June 29, 1964, Associate Justice Harlan extended the time within which Petitioner was to file this Petition to July 27, 1964.

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* (References are to Appendix pages in the Court below).

ISSUES PRESENTED

I.

SECRET INTERROGATION OF A SUSPECT IS A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT:

A. The element of physical intrusion is not necessary to violate the right of privacy.

B. Such a search is inherently unreasonable.

C. Such a search is unreasonable because it requires the suspect to be a witness against himself.

D. Such a search is unreasonable because it deprives the suspect of the opportunity to obtain counsel.

II.

WHERE THE INVESTIGATION HAS FOCUSED UPON A SUSPECT HE MUST BE AFFORDED THE OPPORTUNITY TO OBTAIN COUNSEL BEFORE HE IS INTERROGATED BY ANYONE.

REASONS FOR ALLOWANCE OF THE WRIT

STATEMENT OF FACTS

On September 17, 1961, the defendant had returned to his home town, Thompson, Connecticut, a small community in the northeastern corner of the state, to attend a memorial service for his grandmother. (R. 134a) During this family gathering, a sister-in-law asked the accused to donate some of his books to a branch of the community library that was to be established across the street from his family home. On that occasion, Beno indicated that his books were a bit too technical; but, he told his sister-in-law he would be willing to donate a set of encyclopedia if he could get one at a good price. (R. 134a)

On September 22, 1961, Beno was assigned a return of the Walden Book Company of Stamford, Connecticut for audit by his supervisor, Fogwell. This was on a Friday. On the following Monday, Beno discussed the productivity of the return with his acting supervisor, he discussed the company with another agent who had audited a prior year return, and he checked the office index card to determine any deficiencies produced by that prior audit. On the basis of the information and a quick perusal of the return, Beno decided to survey the return. After affixing a stamp to the return, signing and dating it, the return and the control card were thereafter outside of the control of the accused. The Walden return was surveyed the first thing on the morning of September 26, 1961, and he never had the return in his possession or control again.

Later the same morning, Beno called Richard Guinta, at the latter's place of business, a man that he had met some time prior to that date. (T. 12a, 22a) During this conversation, the defendant told Richard Guinta that he was interested in obtaining an encyclopaedia and good dictionary. (T. 13a, 26a, 27a, 28a) Richard Guinta told Beno that he did not know whether these items were carried by the Walden Book Co., but he would contact his brother, Charles Guinta, at the Walden Book Company. Charles Guinta's name appeared on the return that Beno had surveyed. (Ex. B)

Richard Guinta did call his brother at Walden about an encyclopaedia but, he did not understand that he was being used as an instrument in the solicitation of a bribe. (T. 33a)

After receiving the call from his brother, on September 26, Charles Guinta discussed the matter with a representative of the firm auditing the company's books, the president of Walden, and the company attorney, and he tried to phone the inspection service of the Internal Revenue Service. Having been

unable to reach the inspection service in Boston on September 26, a second call was placed on September 27, 1961. On the next morning two agents from the Inspection Service in Boston arrived at the Walden Company office in Stamford. (T. 35a-38a)

At about the time the agents were arriving in Stamford, Beno called Richard Guinta to inquire whether or not he had heard from his brother and Guinta told him that he had been unable to reach Charles. (T. 14a, 29a, 30a)

The federal agents, meanwhile, were requesting Charles Guinta to assist them in investigating the suspected shakedown. The agents pointed out that they would like to get Beno's answers to certain suggested subject matter recorded and were, therefore, allowed to install a hidden microphone in a bookcase in Guinta's office plus other paraphrenalia for tape recording. Sometime after the call to Boston on September 27, 1961 and luncheon with the federal agents on September 28, Charles Guinta had ordered a 24 volume set of the Britannica. The agents then explained the use of the recording equipment, the subjects that should be discussed and the plan for getting Beno to come down to the Walden office. (T. 71a, 86a, 87a)

Having devised the plan, Guinta, acting at the direction of the federal agents, made two calls to Beno on the morning of September 29, 1961. Failing to reach Beno on the second call, Guinta left word for Beno to call him. Later that morning, Beno returned the call, and Guinta told him he had a Britannica and proceeded to attempt to put the plan into effect. On that same day, the accused called his cousin, George Philip, for a loan of $250.00. Philip wasn't sure of the availability of the money and later that afternoon he told the defendant he didn't have the money. (T. 136a) Beno then called Guinta and cancelled the meeting for that day indicating he would be in touch on the following Monday.

On Sunday, October 1, 1961, the accused borrowed $75.00 from his girl friend, Erica Boerger, telling her at that time that he needed the money to buy some books. (T. 137a-138a)

The next morning Beno called Charles Guinta pursuant to the arrangement made on the precedent Friday and Guinta told him to come to the company office and gave him the directions. In the meantime, a Miniphon device was secreted upon Guinta's person and activated. The agents went over the program of discussion and removed themselves to an adjoining room, where, once conversation began, a federal agent could and did overhear by reason of a head set jacked into the tape recorder, the answers the accused would give to the pre-programmed discussion. Later on, by use of a further artifice, specifically suggested to the helpful assistant, Guinta, a fib was told to the defendant in order to induce him to take physical possession of the two cartons (Exs. K and L) containing the 24 volume Britannica. As this happened, the defendant was arrested for a violation of the bribery statute. It was clear that the over-hearing agents could not have heard that portion of the conversation covered by Exhibit I prior to the arrest of the accused.

AS TO THE FIRST QUESTION PRESENTED

SECRET INTERROGATION OF A SUSPECT IS A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT.

A. The Element Of Physical Intrusion Is Not Necessary To Violate The Right Of Privacy.

Petitioner contends that the use of an assistant, instructed to surreptitiously interrogate a suspect, for the purpose of obtaining and recording incriminating statements, as was done in the instant case, was violative of the Fourth Amendment to the

Constitution of the United States prohibiting unreasonable searches and seizures. The Petitioner admits that the statements which were obtained were not made in a "house", nor was there a government "trespass" of the property, which was occupied by the Petitioner, at the time. Petitioner's contention in this regard has been rejected in the Court below because that Court determined that there was no unauthorized physical invasion, by the government, into a constitutionally protected area.

> *Cf. On Lee* vs. *United States*, 343 U.S. 747 at 751 (1952).

We advance the argument that this Petitioner has a right to privacy, under the Fourth Amendment, which cannot be limited by his presence at a particular place; that this right extends, not only to his personal property, but to his *person*, as well.

The concept of an unauthorized physical intrusion, as expounded in such cases as *Goldman* vs. *United States*, 316 U.S. 129 (1942); *Silverman* vs. *United States*, 365 U.S. 505 (1961); and *On Lee* vs. *United States*, 343 U.S. 747 (1952) has been taken to mean that absent such an unauthorized physical intrusion, or "trespass", (as it is sometimes called) the invasion of the individual's privacy is a proper function of the police authorities. We disagree with this interpretation.

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . (that constitutes) the offense. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation."
>
> *Boyd* vs. *United States*, 116 U.S. 616, 630 (1886).

The question is not — "Has a trespass been committed" — which should be determinative of the ultimate answer, as to whether or not a sufficient invasion of privacy has occurred since the trespass may be a "circumstance of aggravation." The real question to be determined is whether or not the individual's personal security and personal liberty have been infringed upon.

The anomaly by which the Courts require an *invasion of property* in "eavesdropping" cases, was recognized by Douglas, J., concurring in *Silverman* vs. *United States*, *supra*, at 512, wherein he said:

> "An electronic device, on the wall of a house, is a permissible invasion of privacy according to *Goldman* vs. *United States*, *supra*. While an electronic device that penetrates the wall, as here, is not. Yet, the invasion of privacy is as great in one case as in the other. The concept of 'an authorized physical penetration into the premises', on which the present decision rests, seems to me to be beside the point."
>
> *Cf. Clinton* vs. *Virginia*, —— U.S. ——, 84 S. Ct. 1186, 12 L. Ed 2d 213 (1964).

where the "trespass" or invasion appears to have been limited to the penetration of the length of a thumb tack used to support the microphone on the outside wall of the house. Counsel has measured the average length of such a tack and discovered that the penetration in the *Clinton* case, *supra*, could not have exceeded 5/16ths of an inch. We should not have to resort to a ruler to measure the extent of Constitutional rights.

B. Such A Search Is Inherently Unreasonable.

The Petitioner contends that a trespass is but one of many means that is capable of characterizing a search as one that is unreasonable. Beno's property was not violated here. There

was no "breaking of his doors or rummaging through his drawers." Rather, and equally important, his person was violated by a process of surreptitious interrogation designed to *search his mind* for the tidbits of thought and intention that could incriminate him. Ideas, thoughts, and other mental processes are much more sacred than tangible property, for they are a very part of one's being. To say that the Fourth Amendment stops short of protecting the "possessions of the mind" against the type of inquisatorial extraction employed against Beno severely limits the useful life of the amendment. What was done constituted a search of Sam Beno, just as effectively as if the government had gone through his pockets. There can be no question but that the Fourth Amendment protects the intangible spoken word.

Wong Sun vs. *United States*, 371 U.S. 471, 485 (1963).

Petitioner contends that the "search of the interrogation", that is a surreptitious interrogation of a suspect for the purpose of obtaining incriminating statements, is, first of all, a search; and, secondly, that such method is *inherently unreasonable* in that it violates the personal security, integrity, and liberty of the individual.

Boyd vs. *United States*, *supra*.

C. Such A Search Is Unreasonable Because It Requires The Suspect To Be A Witness Against Himself.

We contend that the "search of interrogation" is an unreasonable search of the individual in that it deprives him of his rights under the Fifth Amendment. We favor a system of fairness in our accusatorial system of justice. That system recognizes that the guilty as well as the innocent have certain fundamental rights. We cannot permit, on the one hand, the payment of lip service to those rights; and, on the other hand, to allow them to be defeated by artifice or trick. We weaken

the foundation of justice if we say the people have the right to refrain from making an incriminating statement; but, if they are lulled into an atmosphere of security, or if they are duped in such a manner that they fail to recognize the danger of the situation, or the need to assert the right, the right is lost. There must be placed upon the law enforcer not only the duty of bringing criminals to justice, but the honor of upholding his Constitution and according its protection to the public. We fail in this if we permit the rights granted by our Constitution to be circumvented by artifice on the part of those whose sworn duty it is to uphold the Constitution. Beno was just as effectively deprived of his privilege against self-incrimination as if the government has used coercion to elicit the statements.

D. Such A Search Is Unreasonable Because It Deprives The Subject Of The Opportunity To Obtain Counsel.

We contend that the pre-arranged plan to interrogate Beno and to record his statements, accomplished in a clandestine manner and without advising him of his rights, deprived petitioner of his right to counsel in violation of the Sixth Amendment, and therefore rendered the search of interrogation unreasonable, and in violation of the Fourth Amendment. The interrogation, by design, was to produce statements to be used at the trial. Certainly the investigation had "focused" upon Beno to such an extent that he was in "need of legal aid and advice."

Escobedo vs. *Illinois*, —— U.S. ——, 32 L.W. 4605 (1964).

The import of *Escobedo* is that the right to counsel attaches when the investigation focuses upon the suspect. We further contend that the right to counsel is equated with the opportunity to obtain counsel. If the suspect is deprived of the opportunity by trick, his right to counsel has been violated. Depriv-

ing Beno of his right to counsel rendered the search of interrogation unreasonable and violative of the Fourth Amendment,

Massiah vs. *United States*, —— U.S. ——, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964).

Escobedo vs. *Illinois*, —— U.S. ——, 32 L.W. 4605 (1964).

To summarize the "search of interrogation," is unreasonable and therefore violative of the Fourth Amendment:

1. Because it is unquestionably an invasion of privacy;
2. Because, in its accomplishment, it deprives the interrogated his rights under the Fifth Amendment;
3. Because, in its accomplishment, it deprives the interrogated of the right to counsel.

There has not been an intrusion of property, it is true. However, there has been a trespass committed upon the individual and the rights granted to him under the Constitution, which must be considered equally repugnant.

AS TO THE SECOND QUESTION PRESENTED

Where The Investigation Has Focused Upon A Suspect He Must Be Afforded The Opportunity To Obtain Counsel Before He Is Interrogated By Anyone.

We have presented above the contention that the denial of the right to counsel, which is a necessary element in the successful accomplishment of the search of interrogation, makes the search unreasonable.

We now submit that the right to counsel, as an independent right — that is, independent of its effect on the Fourth Amendment — affords the Petitioner the basis for a claim of error in the Courts below.

Gideon vs. *Wainwright*, 372 U.S. 335 (1963) holds that an accused is entitled to a lawyer at his trial. *Massiah* vs. *United States*, —— U.S. ——, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) holds that the accused is entitled to a lawyer before trial and after indictment. *Escobedo* vs. *Illinois*, —— U.S. ——, 32 L.W. 4605 (1964) holds that a suspect is entitled to a lawyer before indictment.

It is true that in *Escobedo supra*, the petitioner was in the custody of police; and he was denied access to counsel he had already retained. Beno was not in the custody of the government agents; and, he had not retained counsel before the interrogation. However, the right to counsel cannot be confined to the right to seek the advice of counsel already retained. If this is the extent of the right, *Gideon* was wrongly decided, for; at his trial, he was neither represented by counsel, nor prevented from seeking the advice of counsel already retained. Rather, he was denied the *opportunity* to obtain the advice of counsel.

The right to counsel cannot be confined to instances in which the suspect is in actual police custody. The gist of the right is to afford expett advice to the suspect. The advice is just as necessary where the suspect is under interrogation and is being questioned without having been taken into custody or placed under arrest. In essence, Petitioner contends that the right to counsel is not confined to the jailhouse. The Supreme Court in *Massiah* vs. *United States*, *supra*, quoted with approval Judge Hays' statement in his dissenting opinion in the Court of Appeals that the accused was more seriously imposed upon because he did not know that he was under interrogation by a government agent.

Cf. United States vs. *Massiah*, 307 F.2d 72-73 (2d Cir. 1962.)

Beno's right to counsel began when the investigation "focused" upon him, that is, when the interrogation began. *Escobedo* vs. *Illinois*, *supra*, "Petitioner had become the accused, and the purpose of interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." *Ibid.*

The right to counsel must be equated with the opportunity to obtain counsel. Only the investigating officer can afford that opportunity to a suspect who is unknowingly interrogated for the purpose of obtaining incriminating statements. Can we say that because Beno did not know the purpose of the interrogation his right to counsel under the Sixth Amendment did not exist? We think not. The *necessary* implication in affording one the right to counsel, is, where the interrogation is surreptitiously performed, that the suspect must be informed of his constitutional rights. *Escobedo* vs. *Illinois*, *supra*. Only then can we say that he has been afforded the right to counsel.

Consider the dilemma of Messrs. Massiah, Escobedo and Beno. In all three cases the common denominator is the incriminating statement *unwittingly* uttered. Massiah did not know he was "broadcasting" to a government agent. Escobedo did not know that his admission to the police of "complicity" made him a principal in the murder, and Beno did not know that he was being prodded by a government assistant into making incriminating statements, which were simultaneously recorded, all to be used to convict.

It was Petitioner's claim at the trial, and on appeal, that Beno was entitled to a warning, and he was entitled to be advised as to his rights. *Massiah* and *Escobedo* reflect the seriousness of such a situation.

There is also reflected in those decisions a "policy", firstly, that a suspect, under the Fifth Amendment, need not speak at all, and secondly, under the Sixth Amendment, if he chooses to

speak it must be with the advice of counsel, or after having an opportunity to obtain counsel.

The "unsuspecting suspect" is helpless when the investigation is secretly conducted. How can we justify the deprivation of his constitutional rights? We can not longer justify the extraction of an incriminating statement on the basis that it was voluntarily made, for *Massiah* and *Escobedo* hold that the statement, though voluntary, is inadmissable if made at a time when the accused had the right to counsel.

There is implicit in *Massiah* and *Escobedo* a qualification of the "voluntary" doctrine. This qualification recognizes that an incriminating statement may not be voluntary even absent force or coercion. The concept of voluntariness has taken on a new meaning. We must realistically conclude that a man would not convict himself by his own words if he knows that he cannot be made to do so. Therefore, a statement can be truly voluntary only when there is an *affirmative* waiver of the Fifth and Sixth Amendment after the speaker is aware that he has a choice either exercise the rights that afford him the protection or to waive them. The "affirmative waiver" cannot be inferred under circumstances such as are involved in the case at bar.

ADDITIONAL REASONS FOR GRANTING THE WRIT

That the use of this type of assistant government agent raises fundamental and substantial issues has already been pointed out by this Court in *Lopes* vs. *United States*, 373 U.S. 427 at 444.

> "This Court has not yet established the limits within which the police may use an informer to appeal to friendship and camaraderie-in-crime to induce admissions from a

suspect, but sufficient to say here, *the issue is substantial.*" (emphasis added)

In deciding the *Massiah* case, *supra*, the Court intentionally left open the interrelationship between the Fourth Amendment problem, as it is effected by the clandestine interrogation and recordation by aides of government agents. The basic issues have been the subject of extensive examination by the Congress. *Cf.* 87th Cong. 2nd Session "Wiretapping and Eavesdropping" Summary Report of Hearings 1958-61 by the Sub-Committee on Constitutional Rights of the Judiciary United States Senate; and by a broad spectrum of responsible elements of our society. The prosecutive process should be made clear by this Court to preserve, not only the rights of this Petitioner, but of equivalent import, to give proper direction to law enforcement agencies in their investigative activities to insure effective police action only within the framework of proper Constitutional standards.

CONCLUSION

Each of the questions presented herein poses important questions to Federal Criminal Law that should be decided by this Court.

The writ of certiorari should be granted.

W. PAUL FLYNN, Esq.,
Attorney for the Petitioner

FRANK J. RACCIO, Esq.,
BERNARD P. KOPKIND, Esq.,
CHARLES L. FLYNN, Esq.,
Of Counsel.

Date: July, 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 460—September Term, 1963.

(Argued May 12, 1964 Decided May 28, 1964.)

Docket No. 28796

UNITED STATES OF AMERICA,
Appellee,

v.

SAMUEL G. BENO,
Defendant-Appellant.

Before:

KAUFMAN and HAYS, *Circuit Judges,*
and BARTELS, *District Judge.**

Appeal from a judgment of conviction for soliciting and receiving a gratuity, with the intent that it influence an official decision, 18 U.S.C. § 202, after a trial by jury before Timbers, *J.*, in the United States District Court for the District of Connecticut.

Affirmed.

ROBERT C. ZAMPANO, United States Attorney, District of Connecticut, New Haven, Connecticut, *for appellee.*

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* Sitting by designation.

W. PAUL FLYNN, of Kopkind & Flynn, New Haven, Connecticut (Frank J. Raccio, on the brief), *for defendant-appellant.*

KAUFMAN, *Circuit Judge:*

After we reversed and remanded his initial conviction for accepting a gratuity with the intention that it influence his official conduct, because incompetent and prejudicial evidence was admitted at his first trial, 324 F.2d 582 (2d Cir. 1963), Internal Revenue Agent Samuel G. Beno was again tried and convicted for the same offense. Asserting that his "involuntary admissions" were improperly admitted on his second trial, Beno again appeals.

Virtually all of the relevant facts were fully set forth in our opinion on Beno's first appeal and it is unnecessary to restate them here in any detail. For present purposes, it is sufficient to note that the chain of events leading to Beno's arrest commenced when the defendant noticed the name of Charles Guinta, listed on the income tax return of the Walden Book Company of Stamford, Connecticut, as treasurer of the company. Since he had previously known an accountant by the name of Richard Guinta, Beno telephoned Richard, informed him that Walden's return was before him for an audit, and asked whether Richard and Charles were related. When he was told that the two were brothers, Beno informed Richard that he was interested in obtaining a set of the Encyclopaedia Britannica and a "good dictionary," to which Richard replied that the message would be forwarded to Charles. Subsequently, before Richard was able to tell Charles of Beno's call, the defendant again phoned Richard, and, in Richard's words

at the trial, "mentioned . . . [that] . . . he was interested in an arrangement whereby the books could be mailed to him, and . . . that he would survey the return and mark it 'No tax potential.'"

Immediately upon being informed by Richard of his conversations with Beno, Charles notified the inspection division of the Internal Revenue Service in Boston. And, as revealed through Charles' testimony at trial, the Service requested his cooperation "in finding out whether or not this man [Beno] was merely wishing to purchase a set of encyclopaedia and dictionary, or perhaps solicit a gift." Accordingly, Charles telephoned Beno, and, after Beno told him that he had been assigned Walden's return and "that there would be no problem in it . . . he would survey it," a meeting was arranged between Beno and Charles in the latter's office on October 2, 1961. Without Beno's knowledge, it was planned that a Fargo tape recorder would be hidden in the office, and that a Minifon recorder would be secreted on Charles' person so that the ensuing conversation might be recorded.[1] In addition, as it turned out, Internal Revenue agents were stationed in a room adjoining Charles' office, and, by means of a headset connected to the tape recording apparatus, were enabled to overhear the October 2nd conversation as it was in progress.

At the trial, Charles testified that the agents provided him with general instructions concerning the course of his conversation with Beno. Thus, in light of Beno's earlier remarks to both

[1] The tape recorder was designed to record any conversation which took place in Charles' office; the Minifon was also able to pick up any additional statements made after Charles and Beno left the office. So as to eliminate duplication at trial, only the Fargo tape was played with respect to the office conversation, and only those portions of the Minifon recording which related to the discussion after Charles and Beno left the office were played for the jury.

Guintas, Charles was instructed to discover "what a survey was all about," as well as to "ask Mr. Beno about my own personal return, to give Mr. Beno every opportunity to pay for the books, be sure to tell him what the price of the books were, be sure to tell him that this was a no-discount [redacted] and to give him every opportunity to pay for the books." As recounted by Charles at trial, the agents "repeated several times that they were interested in getting the facts and to determine whether or not there was any wrong-doing here."

The October 2nd conversation took place as planned. Although, as we indicated in our earlier opinion, Beno did not provide the prosecution with "plainly incriminating admissions," 324 F.2d at 583, he never offered to pay for the books, and the jury properly could have found from all the evidence and circumstances that Beno was subtly promising to relieve Walden of any potential tax difficulties if Charles were generous enough to supply the books without charge, or in short, that he solicited a bribe. In any event, Charles gave Beno the encyclopaedia and the dictionary, and, after they were placed in Beno's car, the defendant was arrested by the Revenue agents.

At the trial, Charles testified as to his October 2nd conversation with Beno, and the tape and Minifon recording of that conversation were placed into evidence and played for the jury. On appeal, in a claim vaguely based on the Fourth and Fifth Amendments, Beno appears to contend that the conversation with Charles, prearranged and recorded by government agents, was in some respect illegal, and that Guinta's recounting of Beno's end of the conversation thus represented and improper attempt to introduce "involuntary admissions" of the defendant. The same claim seems to be made with respect to the introduction of Exhibits H and I, the recordings of the con-

versation, and to the playing back of portions of these to the jury.

At the outset, it would be helpful to clarify several aspects of the defendant's arguments on appeal. First, Beno has at no time — either here or below — raised any question of a possible claim of entrapment, and, in fact, the defense was explicitly disclaimed at trial. There is, therefore, no contention that Beno was "lured" into committing an offense — either by the government agents, or by Charles Guinta, acting on their behalf. Compare *Sherman* v. *United States*, 356 U.S. 369 (1958). Secondly, as the statements of the government agents make plain, the October 2nd conversation transpired when the charges against Beno were at most in the investigatory stage; the agents were simply "interested in getting the facts and to determine whether or not there was any wrong-doing." Accordingly, decisions which deal with post-indictment questioning of a defendant are wholly inapposite. See *Massiah* v. *United States*, —— U.S. —— (32 U.S.L. Week 4389, May 19, 1964); *People* v. *Waterman*, 9 N.Y. 2d 561, 216 N.Y.S. 2d 70 (1961).

With these considerations in mind, it is clear that Beno's amorphous contentions are wholly without merit. In the first place, it seems plain that anything which Beno may have said

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There is some question on appeal as to whether Beno made a timely objection at trial to the introduction and playbacks of the tape and Minifon recording. While the issue is not clear, and although it might be argued that any objections, even if made, were waived, we will assume for present purposes that all objections were raised in the proper fashion and adhered to.

Indeed, the Supreme Court in *Massiah* was careful to note that "it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted." In the present case, where Beno had not even been arrested at the time of the conversation in question, his argument is all the weaker.

during the course of the October 2nd conversation is not to be considered as an "admission," made *after* the commission of the offense. The words constituted, instead, *the commission of the crime itself*. See *Todisco* v. *United States*, 298 F.2d 208, 212 (9th Cir 1961), *cert. denied*, 368 U.S. 989 (1962). If Beno was found to have been subtly soliciting a bribe, he was *at that moment* violating the law; absent a claim of entrapment, we can perceive of no reason why Guinta might not testify as to the defendant's attempts to solicit the bribe. In short, Beno's efforts to strike Guinta's testimony as embracing "involuntary admissions" seem almost frivolous; bribery statutes would have little meaning if a victim were not permitted to testify that he had been asked for a bribe. It being true that Guinta might clearly testify as to the dialogue between Beno and himself during the bribe solicitation incident, there would seem no reason why the recorded versions of this dialogue — as embodying a far more accurate reconstruction than Guinta's recollections — could not also be introduced, and played for the jury. As the Supreme Court observed in relation to the playback of a tape which contained an incriminating conversation between the defendant and a government agent, "the [recording] device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." *Lopez* v. *United States*, 373 U.S. 427, 439 (1963).

Secondly, constitutional claims, similar to and stronger than those invoked by Beno, have been repeatedly rejected in a long line of cases. See, *e.g.*, *On Lee* v. *United States*, 343 U.S. 747 (1952); *Lopez* v. *United States*, 373 U.S. 427 (1963); *United States* v. *Kabot*, 295 F.2d 848 (2d Cir. 1961), *cert. denied*, 369 U.S. 803 (1962). In *On Lee*, the defendant's friend was "wired for sound" and entered On Lee's laundry to conduct a conversation with him *while the defendant was at large on bail and awaiting trial*. Affirming On Lee's conviction, the Supreme

Court held that a government agent who had been standing outside the laundry was properly permitted to testify as to the defendant's admissions, which the agent had heard through a receiver connected to the transmitter carried by the cooperating friend. More recently, in *Lopez*, the Supreme Court cited *On Lee* in approving the receipt into evidence of a tape recording, made when a *government agent* secreted a recorder on his person during a conversation with the defendant *in the defendant's office*. And finally, in a bribery case virtually identical to this one, a recorded conversation pre-arranged by government agents was held properly admitted by this court in *Kabot*.

Here, the government agents were engaged in an honest attempt to discover the nature of Beno's conduct; the conversation took place in Charles Guinta's office with his consent; Charles was not a government agent but a private citizen; and, the case was still in the investigatory and pre-arrest stage. It follows, therefore, that Beno's contentions are considerably weaker than those rejected in *On Lee* and *Lopez* and are certainly no stronger than those which we found unpersuasive in *Kabot*. The recordings were hence properly received in evidence. Since Beno's other contentions are without merit, the conviction is affirmed.

APPENDIX B

Title 18 United States Code, Section 202.

62 Stat. 691, 80th Cong. 2nd Sess. Chapter 641, June 25, 1948.

Section 202: Acceptance Or Solicitation By Officer Or Other Person

"Whoever, being an officer or employee of, or person acting for on on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, . . . asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust or profit under the United States."

BRIEF FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 328

SAMUEL G. BENO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 333 F. 2d 669. A prior opinion of the court of appeals is reported at 324 F. 2d 582.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1964. On June 29, 1964, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including July 27, 1964 and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conversation while unlawfully soliciting a gratuity was properly proved by the testimony of his victim, corroborated by wire and tape recordings.

STATEMENT

After a trial by jury in the United States District Court for the District of Connecticut, petitioner was convicted on an indictment charging that he solicited and accepted a gratuity from a corporate taxpayer with intent that it influence his official action as an employee of the Internal Revenue Service in violation of 18 U.S.C. 202.[1] He was sentenced to imprisonment for one year and one day (R. 149a). The court of appeals affirmed.

1. At trial the government presented, *inter alia*, the testimony of the corporation's treasurer, one Charles Guinta, from whom petitioner solicited the gratuity on October 2, 1961. Tape and wire recordings of the conversation had between petitioner and Guinta in the latter's office on that date were played for the jury.

On September 26, 1961, petitioner, when examining the return of the Walden Book Com-

[1] A first trial upon the same charges also resulted in a conviction which was reversed, and the case remanded for a new trial, because of the admission of incompetent evidence. See *United States* v. *Beno*, 324 F. 2d 582 (C.A. 2).

pany (of Stamford, Connecticut), noticed that the name of Charles Guinta was listed thereon as company treasurer. Since he knew an accountant by the name of Richard Guinta, petitioner called Richard to ask if he were related to Charles. Upon being told that the two Guintas were brothers, petitioner told Richard that he was interested in obtaining a set of Encyclopedia Britannica and a "good dictionary." Richard replied that he would call his brother Charles (R. 13a). Two days later petitioner again called Richard Guinta, said he was interested in an arrangement whereby the books could be mailed to him, and added that he would "survey" the Walden Book Company return, i.e., return it to the internal revenue home office without examining the company's books (R. 59a) and mark it "no tax potential" (R. 14a).

When Charles Guinta was told by his brother about the conversation with petitioner, he notified the inspection division of the Internal Revenue Service. The Service asked for Guinta's assistance "in finding out whether or not this man was merely wishing to purchase a set of encyclopedia and dictionary, or perhaps solicit a gift." (R. 89a).

On September 29, Charles Guinta attempted to telephone petitioner. When petitioner returned the call, Guinta told him that the company had the encyclopedias and asked for more information. Petitioner explained that there would be no problem as to the company's return, that he would "survey" it and send it back to the home office. Guinta suggested that petitioner come to his office to talk it over, and petitioner answered that he would call him later. Petitioner

later arranged a meeting for Monday, October 2 (R. 50a-53a).

On October 2, Internal Revenue investigators, with Guinta's permission, installed a Fargo tape recorder in Guinta's office and secreted a minifon wire recorder on Guinta's person (R. 55a). The investigators removed themselves to an adjoining room where, by means of a headset connected to the tape recording apparatus, they were able to hear any conversation taking place in the office (R. 123a). They instructed Guinta "to give Mr. Beno every opportunity to pay for the books, be sure to tell him what the price of the books were, be sure to tell him that this was a no-discount item, and to give him every opportunity to pay for the books" (R. 89a-90a). The investigators "repeated several times that they were interested in getting the facts and to determine whether or not there was any wrong-doing here" (R. 90a).

When petitioner arrived in Guinta's office, the conversation between the two men was recorded. Petitioner expressed his interest in the books and explained how he would "survey" a tax return "if you have a friend" (R. 59a). He said that he had surveyed the corporation's return, and that he would look for the related return of Walden's subsidiary company, assign it to himself and survey that (R. 60a). Each time that Guinta brought up the subject of the price of the books ($400) or the no-discount character of the books, petitioner changed the subject (R. 94a). The two men went to the stockroom to pick up the books. Petitioner thanked Guinta, shook hands, told him to let him know if he ever had prob-

lems, and left without referring to payment for the books (R. 62a, 95a).

2. When Charles Guinta was asked about his conversation with petitioner, petitioner objected that such testimony was inadmissible because "the statements were not voluntarily made, that they were in fact induced * * * and that the defendant has the right to assert this privilege [against self-incrimination] at this time" (R. 44a). Counsel specifically disclaimed that petitioner was thereby making a claim of entrapment (R. 44a-45a). The objection was overruled (R. 49a). Thereafter the recording equipment and the recordings were introduced into evidence (R. 111a, 118a, 120a, 123a) with petitioner renewing only his original objection and that only with respect to the minifon recording (R. 122a).

Petitioner's defense was that he did not expect to receive a gratuity but intended to pay for the books (R. 146a-147a).

ARGUMENT

Petitioner's contention that the evidence of his conversation with Charles Guinta was inadmissible as having been obtained in violation of his constitutional rights is without merit.[1] At the time of his conversa-

[1] Specifically petitioner argues that his rights against unreasonable search and seizure, and self-incrimination, were violated and that he was deprived at the time of the right to assistance of counsel. Petitioner made no motion to suppress prior to or during trial. His objection at trial to the evidence now challenged vaguely expressed an assertion of a privilege against self-incrimination and was not consistently adhered to with respect to all the evidence of the conversation.

tion with Guinta, he was not making an admission subject to interrogation after the commission of the crime, but was in fact engaged in the actual commission of the crime. See *Todisco* v. *United States*, 298 F. 2d 208, 212 (C.A. 9), certiorari denied, 368 U.S. 989. Obviously, the government was not required to furnish him with a lawyer at the time he chose to commit a crime.

The unlawful solicitation, like the offer of a bribe, is not a constitutionally protected communication. *Lopez* v. *United States*, 373 U.S. 427, 438. This being so, the solicitor takes the risk that his solicitation will be accurately reproduced in court "whether by faultless memory or mechanical recording." *Lopez*, *supra*, 373 U.S. at 439. As in *Lopez*, the recording furnished corroborative evidence of the witness' tetimony at trial. Moreover, here, unlike *Lopez*, there was not even a physical intrusion upon premises to which petitioner had any right.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

SEPTEMBER, 1964

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